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No. 852

In The Supreme Court of the United States

October Term, 1959

LEE C. MOORE CORPORATION,
Petitioner,

VERSUS

EMMETT W. PRYOR and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF PETITIONER, LEE C. MOORE CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Lee C. Moore Corporation, asserts jurisdiction of this Honorable Court for writ of certiorari to review a judgment of the United States Court of Appeals

for the Tenth Circuit reversing a judgment of the United States District Court for the Western District of Oklahoma, and remanding the cause for a new trial, on the grounds that the court of appeals, in reversing said judgment, decided an important State question in conflict with applicable State law, within the scope of Rule 19 (b) of this Court.

Respondents, Emmett W. Pryor and Pacific Employers Insurance Company, oppose the petition for writ of certiorari to review the opinion (officially reported at 262 F. 2d 673) and judgment of the United States Court of Appeals for the Tenth Circuit, entered December 22, 1958, for the following reasons:

(1) That decision is not in conflict with applicable Oklahoma law.

(2) The case of *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835, asserted by petitioner for the first time in this Court, to be controlling, is merely factually distinguishable from this case, as are the other cases cited by petitioner in its Petition for Writ of Certiorari.

STATEMENT OF FACTS AND ISSUES

Respondent, Emmett W. Pryor, and his employer's insurance carrier, Pacific Employers Insurance Company (respondent), instituted this action for damages for personal injuries sustained by Pryor in the collapse of the mast of an oil well drilling rig, while being utilized in pipe

pulling operations, against petitioner, Lee C. Moore Corporation, as the manufacturer of said mast. Recovery was sought against petitioner on the ground that the proximate cause of the collapse of the mast was the negligence of petitioner, as manufacturer, in improperly welding the mast to its base in the manufacturing process.

The allegations of improper welding in the manufacturing process were supported by undisputed expert evidence of engineers, metallurgists and welders presented by respondents, as observed by the trial court in his findings of fact and conclusions of law. These expert witnesses testified that the weld, if properly fused, would be expected to have the same useful life as the parent metal. Expert evidence showed that failure of the mast was at the point of the defective weld (R. 47, 48, 52, 60, 61, 93).

However, the trial court, in the face of the undisputed evidence of the defective weld, nevertheless directed a verdict and entered judgment for defendant manufacturer (petitioner), specifically following the Tenth Circuit case of *Lynch* v. *International Harvester Co. of America*, 60 F. 2d 223, concluding as a matter of law that the stipulated fifteen years of safe use of the equipment, by various purchasers, over a wide territory, foreclosed the probability of negligent manufacture, as the proximate cause of the collapse of the mast (R. 93).

In reversing the decision of the trial court, and remanding the case for a new trial, the United States Court

of Appeals for the Tenth Circuit noted strict reliance of the trial court upon the *Lynch* case, and the identity of the sole question involved in that case with this one, namely whether prolonged use of the manufactured article without injury absolutely foreclosed negligent manufacture as proximate cause of the injuries, as a matter of law, or whether causation should be left to the trier of facts. The Tenth Circuit Court then specifically receded from its decision in the *Lynch* case, concluding from a reappraisal of the doctrine of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, cited approvingly in the *Lynch* case, together with decisions subsequent to the *Lynch* case, that prolonged safe use of manufactured equipment within its intended purposes, is merely one of the relevant factors pertaining to causation, to be considered by the triers of fact, rather than one of law for the court; that the question becomes one of law only when minds of reasonable men would not differ on the probabilities of cause of the harm.

The Circuit Court then concluded the evidentiary physical facts of the defective weld and failure at the point of the weld, while the rig was being used in customary pipe pulling operations, appearing in the record, constituted such circumstantial evidence, admissible under the laws of the State of Oklahoma, creating a permissible inference that the mast collapsed because of the defective weld, which must be resolved by a jury trial.

REASONS FOR DENYING THE WRIT

PROPOSITION ONE

No unique or conflicting decision involving Oklahoma law was involved in the decision of the Circuit Court to reverse the judgment of the trial court, the sole question here being one of causation, which the Circuit Court determined under meticulous delineation of stated Oklahoma law, or generally applied laws, in absence of an expression of Oklahoma law.

Petitioner contends that certiorari should be granted it on the grounds that the Circuit Court, in reversing the judgment in its favor entered upon a directed verdict, ignored dispositive Oklahoma law by which to judge proximate cause, as established by *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835; and further ignored established judicial procedure on appeal by substituting its judgment for that of the trial court upon physical evidence viewed by the trial court, showing how the collapse must have happened, but not in evidence in physical form before the Circuit Court.

But the *Bison Transport, Inc.* case, *supra*, is clearly distinguishable from the factual situation existing in this cause. In that case, which did not concern asserted negligence of a manufacturer in manufacture and sale of its product, but rather alleged negligence of defendant transport company in furnishing a truck with inadequate brakes on a tractor trailer which deceased employee was required

to drive, the case was reversed with directions to direct a verdict for defendant, upon the stated grounds that there was absolutely no evidence in the record showing primary negligence in asserted furnishing of faulty brakes. The court noted the evidence permitted no other conclusion except that the brakes were in good condition up to the time of the accident, foreclosing the question of faulty brakes as proximate cause of the death of plaintiff's decedent, as a matter of law.

In this case, however, the evidence was undisputed that at the time of manufacture and sale of the mast involved, there was a defective weld between the foot and the leg of the mast. So it must be concluded that primary negligence has been successfully interposed as a factor in the determination of proximate cause. Thus the *Bison Transport, Inc.* case, *supra*, becomes factually inapplicable at once for the disposition of this case. It is interesting to note that the *Bison Transport, Inc.* case, *supra*, was never suggested as controlling prior to petition for writ of certiorari, for obvious reasons.

Petitioner, in reasserting the fact of fifteen years of safe use of the mast as an efficient intervening cause foreclosing negligence in the manufacturing process as the proximate cause of the collapse (page 22 of its brief), and in asserting that there must be "independent proof" of proximate cause (page 23 of its brief), and in stating that the *Lynch* case did not involve the matter of "causal connection between

the alleged negligent manufacture and the happening of the accident" (page 19 of its brief), obviously attempts to rejuvenate the validity of the holding of the Tenth Circuit Court in the *Lynch* case, *supra*, which the Tenth Circuit Court in this case overruled, within the clear province of that court to overrule its decisions, and to re-examine its own doctrines. See *Helvering* v. *Hallock*, 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444, 125 A. L. R. 1368. This is particularly true when the courts of the particular jurisdiction involved have not passed upon the question involved, as in this case. See *Princess Garment Co.* v. *Fireman's Fund Ins. Co. of San Francisco, Cal.* (C. C. A., Ohio), 115 F. 2d 380.

It is obvious from close analysis of the opinion of the Tenth Circuit Court in this case, that said court carefully and meticulously reconsidered the *Lynch* case, in relation to this case, and concluded that in both there was an identity of the ultimate question involved, namely whether prolonged use without injury of a manufactured article constituted a legal issue or factual issue relative to causation, under the doctrine of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. The Circuit Court of Appeals noted that the Oklahoma court has not had occasion to consider the *Lynch* case, nor was an Oklahoma case cited in support of that decision. In determining to overrule the decision of the *Lynch* case, the Circuit Court in this case, permissibly looked to the law of other jurisdic-

tions to determine that the cases consistently hold that prolonged use of a manufactured article is but one of the important factors to be considered in factually determining the question of proximate cause, rather than a question of law for the court. See *International Derrick & Equipment Co.* v. *Croix*, 241 F. 2d 216; *Fredericks* v. *American Export Lines*, 227 F. 2d 450; *Hanna* v. *Fletcher*, 231 F. 2d 469, 58 A. L. R. 2d 847. See also *Reed & Barton Corp.* v. *Maas*, 73 F. 2d 359; *Lil* v. *Murphy Door Bed Co. of Chicago*, 8 N. E. 2d 714.

Furthermore, in concluding that proximate cause may be proven by circumstantial evidence, or from permissible inferences from established facts as opposed to the decision of the trial court that direct causal connection must be proven between the asserted negligent manufacturing process and the collapse of the mast, the Circuit Court was following well-established Oklahoma law. See *Mealy-Wolfe Drilling Co.* v. *Lambert*, 256 P. 2d 818; *Mid-Continent Coaches, Inc.* v. *Guthrie*, 257 P. 2d 829; *City of Altus* v. *Martin*, 268 P. 2d 228; *Fleming* v. *Hodgson*, 185 P. 2d 181.

In contending that the Circuit Court, in drawing inferences from the record evidence, without having before it the physical evidence of the replica of the oil drilling rig with the mast, substituted its own findings of fact for those of the District Court beyond its judicial province, petitioner seeks to deny the clear-cut mandate of the

Circuit Court to construe the record evidence, on appeal from a directed verdict in favor of defendant, and to draw every permissible inference therefrom in a light most favorable to plaintiffs (respondents). See *Lanier* v. *Great Atlantic & Pac. Tea Corp.* (C. A. Ark.), 205 F. 2d 292; *U. S.* v. *Blair* (C. C. A. Colo.), 198 F. 2d 557. This does not deny the validity of the cases cited by petitioner to the effect that when only one inference may be drawn from the record evidence to the effect that plaintiff's injuries could not have been caused by defendant's negligence, the question is no longer one of fact for the jury, as in the Oklahoma cases of *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835; *Atchison, T. & S. F. Ry. Co.* v. *Phillips*, 158 Okl. 141, 12 P. 2d 908; *Bradshaw* v. *Superior Oil Co.* (Okl.), 164 F. 2d 165, cited by petitioner.

In this case the Circuit Court has obviously evaluated the record evidence to determine that sufficient physical facts were proven to permit a reasonable inference that the proximate cause of collapse of the mast was the negligence of the petitioner (manufacturer) in defectively welding the mast in the manufacturing process. Under the principles stated by this Honorable Court in *Rice* v. *Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U. S. 70; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 43 S. Ct. 422, 261 U. S. 387; 67 L. Ed. 712; *In re: Woods et al.*, 12 S. Ct. 417, 143 U. S. 202, this Court will not exercise its discretionary judicial prerogative in certiorari, when

the Circuit Court has interposed its judgment upon an appreciation of circumstances which admit of different interpretation, which are not of public importance, as distinguished from that of the parties, and no embarrassing conflict of opinion and authority exists between the various Circuit Courts of Appeal, or between the Circuit Court of Appeal and the State court.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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MAY, 1959.